FILE COPY.

Office Supreme Court U. S.
FILED
JAN 20 1903
JAMES H. McKENNEY,
Clerk.

159

FOURTH NATIONAL BANK OF ST. LOUIS ET AL.

v.

ALBAUGH, RECEIVER, &c.

SUPPLEMENT TO RECEIVER'S BRIEF.

Review of Appellants' Brief.

Appellee's brief, going to press before appellants' was filed, discussed the record in the logical order of the contentions therein disclosed as they appeared to appellee's counsel and without numeral references to pages of appellants' brief or correction of inaccuracies of statement. This supplement is therefore prepared.

Appellants, page 4, state the liability of Cross's sureties on the Liebfried bond at $7,500. It might have been $75,000 (R., 166; Receiver's Brief, 9), but had ceased before the trial.

Page 11 appellants set out an inaccurate copy of the March 4 bill of sale, one of the foundations of the receiver's claim, taken from the record (135, 136), where a mistake seems to have occurred in the transcript. The original instrument, as the record of evidence taken at the trial shows (R., 170), reads "wherever" (not *whatever*) "located" (Receiver's Brief, 18). The inaccuracy seems to be intended to be corrected at appellants' brief (44), where the descriptive clause is repeated as it appears in the instrument.

FIRST POINT.

Appellants' first point, pages 23 to 27, claims that Martindale was not contradicted, and that it was practically an admitted fact that the July and November bills of sale were delivered in Cross's lifetime, and that Martindale was merely surety for Cross upon appellants' debts. The receiver's counsel do not so understand the record. The administrator's answer expressly raised an issue upon the question of delivery of the bills of sale (R., 9, 21, 24, 26). The receiver's answer averred the March 4 bill of sale as enuring to his benefit. A large amount of evidence, termed "immaterial" by appellants, was directed to these questions. Some of the facts tending strongly to show that these bills of sale were never delivered in Cross's lifetime are discussed (pages 47–40, Receiver's Brief). It is further to be noticed that Martindale on the evening after Cross's death told Evans he had "a bill of sale" (R., 67). He mentioned only *one*, and admits he then had the March 4 bill of sale. He wanted Evans to take charge of the property. This was consistent with his then acting under the March 4 bill of sale in interest of the bank, and, as shown in former brief, *supra*, his whole course of conduct was inconsistent with intent to assert rights under the later bills of sale.

The proof is almost conclusive that he got all four of the later bills of sale from Mrs. Cross after Cross's death. She gave him a Sherman House sealed envelope, the contents of which she did not see (R., 162), and later two bills of sale, which she saw. If the two in suit were in the sealed envelope, then all his statements and admissions that he had no interest were true, and the claim now asserted was an afterthought, based upon the possession of the posthumous delivered bills of sale as color for the claim. Cross had business experience and knew the necessity for delivery of papers. The fact that he endorsed the sealed envelope

"Give the enclosed to Mr. Martindale at once, there is a question of law involved," shows there was something there that he did not intend Martindale should have the power to use until after his death, but was willing he should then profit from if he could.

So, too, the fact of his relation to appellants' debts being merely that of surety was a contested issue. It was shown that Martindale had been participant with the senior Cross in the losing ventures of Salina gas and the newspaper, out of which the junior Cross's entanglements arose. Receiver's Brief, 49, 50, Eskridge testified (R., 52) that the St. Louis bank note may have represented part of the legitimate newspaper debt. In the year the New York bank and St. Louis bank debts arose Cross and Martindale incurred "several thousand dollars" over "thirty odd thousand dollars" of losses in their zinc mining ventures (R., 117, 124). The Ryan note (R., 168, 85, 86, 93, 99, 165), certainly entered into the St. Louis bank's "discrepancy" or debt (Receiver's Brief, 42; R., 85, 86, 93, 99, 165). So it is not an admitted fact that Martindale was merely surety for these debts, and it was a fact, as the appellate court observed, that not merely Cross but Martindale also to at least $76,000 had taken and used or through misappropriation and co-operation in making fictitious paper had "*borrowed*" (?) large sums amounting to about $376,000, nearly twice its capital and surplus, between $50,000 and $100,000 of which was incurred after March 4, 1898 (R., 110).

SECOND POINT.

Appellants by their second point (Brief, 28–43) seek to shift their ground and extricate themselves from the position they originally assumed of claiming *in the right* of Martindale, and in which thus far the courts have left them. The Receiver's Brief, page 25, has endeavored correctly to define that position, and, it is believed, has done so.

The July and November bills of sale were not given, as their face shows, for indemnity against particular or certain liabilities or as security for the payment of such. The general rule, no doubt, is, as stated in Brandt on Suretyship, 2d ed., sec. 324, that if a security is given to a surety "for the payment of a debt" and "to discharge such indebtedness" or a mortgage "conditioned that the principal will pay the note," a trust is created charged upon the property for the payment of that specific debt; but such trust may be defeated by countervailing equities between the parties. For such reason, though all the facts existed to create such a trust, this court would not enforce it in Russell *v.* Clarke, 7 Cr., 69, until the parties who might have such equities were brought in.

But here no facts sufficient to create such a trust appear to have existed.

THIRD, FOURTH, AND FIFTH POINTS.

Appellants' third point, Brief, 44–57; fourth, 58–60, and fifth, 61–64, argue that there is not sufficient competent evidence to support the decree. The course of reasoning supporting this proposition is scarcely worthy of a jurist. The facts are not challenged, but the complaint is of the manner in which they were adduced. Because they are claimed to have been irregularly adduced it is claimed that the court should ignore them. This would be strange doctrine in equity, even if the premise were true. But it is not well founded.

Martindale's cross-examination (Receiver's Brief, 29–31) was, as to its scope, within the discretion of the trial court, as defined by this court in Wills *v.* Russell, 100 U. S., 261, 262. No decision is cited wherein the decree of a chancellor is reversed for that reason alone.

Treating Martindale as in every sense the receiver's witness, he was a compulsory one, interested adversely, and was,

as a compulsory witness, subject to impeachment even by the party adducing him (Receiver's Brief, 35–38).

Appellants' third point is fully and more particularly answered (Receiver's Brief, 39–54).

Under their third point, page 53, appellants contend that—

> While we may concede that the equities in favor of appellants, * * * are each controlled, and limited by the extent of the right of Martindale at *that* time * * * to have the property applied for his own protection, yet it must be held, that the right of Martindale, which in anywise limits, or controls such equities in favor of appellants, attached to the property, and not the right as it may have existed at some subsequent period of time after such equities had attached.

This is stated as a premise from which to insist that *afterward* Martindale could make no admission or commit any act which would free the property from its trust obligation for his protection as surety upon the debt. But *eo converso*, page 57, arguing against the March 4 bill of sale, counsel say:

> No claim of any kind was made under this until long after this suit was commenced, and neither Cross nor Martindale regarded it as in force when the later bills of sale were given. Even if delivered in March, 1898, for all that is claimed for it, *the parties to it could displace it with another instrument*, (prior to its being accepted and acted upon by the bank), as they clearly did by the bill of sale of July 15th, which expressly provided that such claims as appellants should be first paid * * * "the balance, if any, to be paid to the First National Bank of Emporia, Kansas, for all matters I owe them."

The casuistry in these two paragraphs is as subtile and refined as that of the lawyer in the fable who was able to draw a distinction between the case of his ox being gored by the farmer's bull, or of the farmer's ox being gored by the lawyer's bull. The precedent has never been deemed

so good as to admit of universal application. It is not applicable here for the following sufficient reason:

Martindale was, next to Cross, the bank's chief executive officer. It was his interest and duty to accept such security. Its delivery to him was a delivery to the bank, and it became assets of the bank, and he had no power to release it (Receiver's Brief, 43, 48). Admitting the execution, delivery, and purpose of the March 4 bill of sale, no adverse interest could arise by or through Martindale or any one knowing of it till Cross's debts to the bank were paid. The making, delivery, and purpose of that bill of sale is a question of fact, found favorably to the receiver's contention; and being abundantly supported by evidence in the record, the judgment will not be reversed.

But independently of the March 4 bill of sale the receiver's claim to the fund might safely be rested on the repeated pledges of the property by both Cross and Martindale to Jobes and to the comptroller, discussed at Receiver's Brief, 51–54. It cannot be tolerated that these three creditors, standing in Martindale's shoes, can assert a superior equity in the property for the protection of Martindale as Cross's surety when Martindale is himself indebted to the bank $113,000, and after both he and Cross, August 2, 1898, in writing to the comptroller solemnly pledged the proceeds of the identical property as free and clear and to payment of Cross's debt to the bank, and were thereby enabled to hold the bank in their control another period during which they or Cross misappropriated another $50,000 (R., 110).

As Martindale was the bank's chief officer next to Cross, in receiving Cross's security for the bank he became trustee to the bank. He could not displace that to his own advantage, gain, or profit, nor could he authorize his creditors to do so for him. The supreme court of Minnesota only recognize a long-established rule when they say, in Gilbert *v.* Hewetson, 79 Minn., 326, that—

A receiver or other trustee of an express trust cannot permit or authorize his agent to do with the trust estate what he is not permitted to do himself. He cannot speculate with the trust property to his own advantage and benefit, nor can he authorize or ratify such acts on the part of his agent.

On a parity of reasoning he cannot authorize his creditor to do so to his relief. A trustee cannot become interested personally, directly or indirectly, in the trust property or adverse to the trust (Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill., 320; Galbraith *v.* Tracey, 153 Pl., 54; Petrie *v.* Badenoch, 105 Mich., 45). The case of Drury *v.* Cross, 7 Wall., 299, and other citations therewith (Receiver's Brief, 44, 45), are conclusive upon this question. Martindale could not, then, in July, 1898, take for himself or his creditors another instrument to "displace" or "supersede" the prior one of March 4. As stated in Meeker *v.* Larson (Nebr.), 90 N. W., 958:

While subrogation is not founded on contract and is a creation of equity, existing solely for accomplishing the ends of substantial justice, there must in every case where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some established principle of equity jurisprudence as recognized by courts of equity.

In the present case such established principles would, on the contrary, be violated. The bank could not itself have pledged this bill of sale from its assets, to the wrong of its own creditors, for the security of the debts of its defaulting officers, Cross and Martindale. No more could they between themselves waive the bank's security or pledge the assets for such purpose.

SIXTH POINT.

Appellants' sixth point is almost wholly an error of fact upon the face of the record. Only the subject-matter of the 8th assignment related to admissions by Martindale made after suit was brought, and belongs properly with appellants' fourth point, and is discussed at Receiver's Brief, 35–38.

The remainder of appellants' sixth point is an error of fact. Suit was begun February 28, 1899 (R., 50). The several admissions of Martindale, proof of which is complained of, were made November 15, and earlier, 1898, to Jobes (R., 101); J. M. Johnson, November 21, 1898 (R., 95); to Stottler and Charles Johnson, November 23, 1898 (R., 109, 110); and February 23, 1899, to Henning, Plumb, and J. M. Johnson (R., 96, 107, 108).

Aside from correction of this error of fact of counsel the matter is discussed (Receiver's Brief, 31–35).

SEVENTH AND EIGHTH POINTS.

These points are but conclusions from the foregoing contentions, except in one particular. It is claimed that "the court had no right or power to grant affirmative relief" upon a mere answer, "not framed technically as a cross-bill."

Counsel must have overlooked the condition of the record. Appellants' Brief, page 3, shows that this is a suit—

over the right to a fund of $53,396.89, on deposit in the Emporia National Bank, of Emporia, Kansas, *to the credit of the receiver, to abide* the final determination of this case.

The record, pages 83, 84, shows that by stipulation of the parties the property was to be sold by the receiver, and—

that he shall deposit the net proceeds derived from the sale of said cattle and other personal property in the Emporia national bank in the name of C. S. Jobes, receiver, and F. C. Newman, administrator, said net proceeds to be treated by all persons interested the same as though the cattle and other personal property were the subject-matter of litigation. Said funds to remain in said bank until a final decision is reached in the courts as to who the said funds belong to.

The matter is controlled by the stipulation which rendered a cross-bill unnecessary, if otherwise it had been necessary

(Heath *v.* Erie R'y Co., 9 Blatchf., 316, 319). Foster's Federal Practice, 3d ed., sec. 171, says:

> When the right claimed by a defendant consists simply in excluding the plaintiff from the right asserted by the latter, of course there is no occasion for a cross-bill. * * *

The funds are in the receiver's name, possession, and control in a designated depository. He needs no affirmative relief. The mere determination that appellants have no right to it leaves the fund with him unembarrassed by any claim.

But were it otherwise, the fund is by the parties submitted to the court to be administered and to be awarded to such of the parties as shall be found its owner. No affirmative relief to recover it from the possession of any one is necessary. The parties stipulate to abide the final award. Such award could be made upon an answer, though process to enforce such award were denied until the active process of the court should be invoked by a supplemental bill.

Furthermore, where an answer in the nature of a cross-bill has been treated as such by the court and the parties and to be sufficient, no objection being taken to it, that effect will be given to it in an appellate court (Kelsey *v.* Hobby, 16 Pet., 269, 278).

The decree should therefore be affirmed.

Respectfully submitted.

JOSEPH R. WEBSTER,
Solicitor for Receiver.

J. JAY BUCK,
Of Counsel.